

HCCW 210/2015

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) NO 210 OF 2015**

IN THE MATTER of DESHELI
COSMETICS (HK) LIMITED
(Company No. 1985896)

and

IN THE MATTER of the Companies
(Winding Up and Miscellaneous
Provisions) Ordinance (Cap. 32)

Before : Hon Harris J in Court

Date of Hearing : 13 January 2016

Date of Decision : 13 January 2016

D E C I S I O N

1. On 25 June 2015 the Petitioner Mega Force Contracting Company Limited which, as its name suggests, is a construction company, issued a petition for the winding-up on the grounds of insolvency of the Company, Desheli Cosmetics (HK) Limited. The Petitioner does not rely

A on an unsatisfied statutory demand to establish insolvency. The reason
B why it does not will become apparent when I explain the facts of this case.
C

D 2. In or about December 2014 the Petitioner was engaged by the
E Company to carry out fitting out works on 27th Floor of the World Trade
F Centre in Causeway Bay. A formal contract was signed. The total
G contract sum was HK\$5,500,000. It would appear that it was the intention
H of the Company that the premises be used in connection with its business of
I selling cosmetics. The Company engaged a project manager, who under
J the contract, was required to issue payment certificates which the contract
K provides are payable within 14 days of presentation to the Company.
L

M 3. The Petitioner says that the works were divided into two parts,
N which would appear to be the case in the contract. The phase 1 work was
O substantially completed on or about 14 January 2014. On 16 January 2014
P the project manager issued the second interim payment certificate in respect
Q of the completed work. The first had already been paid, the second was for
R a total sum of HK\$2,875,518.75, this represented 65% of the contract value.
S

T 4. On 16 January 2014 the Company paid HK\$2,000,000 to the
U Petitioner in respect of the second payment certificate, the balance of
V HK\$875,518.75 has not been paid. On or about 29 January 2014 the phase
1 works were completed and the area was handed over by the Petitioner to
the Company. There is a letter from the Company which it has signed.
The letter records the completion of the phase 1 works.

5. The Petitioner continued with the construction work.
However, the Company continued to fail to pay the balance of the second
payment certificate. The Petitioner treated this as a repudiatory breach of

A contract and purported to accept that repudiation by a solicitors' letter on or
B about 30 September 2014 bringing the contract to an end.

C
D 6. In the meantime the Petitioner says the work that it carried out
E entitled it to further payments, and the total value of the completed but
F unpaid for work exceeds just over HK\$2,000,000. It is, however,
G for present purposes sufficient just to focus on the balance of the second
H payment certificate.

I
J 7. The Petitioner commenced HCA 2130 of 2014 in October 2014
K in order to recover the amounts that it claims it is owed. A defence and
L counterclaim was filed by the Company. During the course of 2015 the
M Petitioner became aware that the Company did not appear to be carrying out
N business at the premises where it had carried out fitting out work, or
O anywhere else in Hong Kong. It appears only to have a registered office in
P Hong Kong.

Q
R 8. The fact that it would appear to have no business in Hong Kong,
S no operational office in Hong Kong, no staff in Hong Kong, no movable
T property in Hong Kong, and its shareholder and two directors are resident
U overseas led it to the conclusion that the Company is insolvent. As a
V consequence the decision was made to proceed to issue a winding-up
petition rather than proceed further with the High Court Action.

9. In order to be satisfied that this is an appropriate case in
which to make a winding-up order, I need to be satisfied that the Petitioner
has shown that there is a debt owed to it by the Company which is unsatisfied
and, this being the case, that the failure to pay that sum and any other
relevant matters demonstrate on the balance of probabilities that the

Company is insolvent, and this is an appropriate case in which to make a winding-up order.

10. If the evidence filed by the Petitioner demonstrates *prima facie* that it does have a claim for an unpaid debt then, as will conventionally be the case where a statutory demand is relied upon, the onus moves to the Company to establish that it has a *bona fide* defence on substantial grounds to the claim for payment of the debt. The principles which apply to the consideration of whether or not a *bona fide* defence on substantial grounds has been demonstrated are summarised in paragraphs 8 and 9 of my decision in *Yueshou Environmental Holdings Limited*¹:

“8. It is well established that a winding-up Petition should only be issued if a creditor is clearly owed a liquidated sum and the debtor company does not have any valid ground for refusing payment. If the company has a bona fide defence on substantial grounds to the debt a petition should not be brought and if the court concludes either on the hearing of a strike out application or on the hearing of the petition that the company does have such a defence, the Petition will be dismissed. Many cases consider what constitutes a bona fide defence on substantial grounds and how the court should approach determining whether such a defence has been demonstrated. I will cite three commonly cited authorities which together explain the established principles.

- (1) The onus is on the Company to show that it disputes the debt on substantial grounds:

“Importantly for this case there is a distinction between a consideration of whether the company has established a defence on substantial grounds and a consideration of whether the evidence is believable. Taken to the ultimate, the difference is between whether there is evidence and whether that evidence is believable. It seems to me that the onus must be on the company against which a petition is presented to adduce sufficiently precise factual evidence to

¹ HCCW 142/2013, unreported, 16 July 2014

satisfy the court it has a bona fide dispute on substantial grounds.”

Re ICS Computer Distribution Ltd [1996] 3 HKC, 440 at 444B

- (2) I have to be satisfied that the Company’s assertions are believable. The test

“... is indeed as simple as whether the defendant’s assertions are believable. But it must be recognised – because failure to recognise it would create a debt-dodgers’ charter – that whether the defendant’s assertions are believable is a question to be answered not by taking those assertions in isolation but rather by taking them in the context of so much of the background as is either undisputed or beyond reasonable dispute.”

Re Safe Rich Industries Ltd (Unreported) CA 81/94, 3 November 1994, Bokhary JA, §13

- (3) The relevant principles were summarised as follows by Kwan J (as she then was) at paragraph 6 of her Ladyship’s judgment in *Re Hong Kong Construction (Works) Limited* (unreported) HCCW 670/2002, 7 January 2003:

“(1) The burden is on the company to establish that there is a genuine dispute of the debt on substantial grounds. In this context, “substantial” means having substance and not frivolous. An honest belief in an insubstantial ground of defence is not sufficient to avoid a winding-up order.

(2) The court should look at the company’s evidence against so much of the background and evidence that is not disputed or not capable of being disputed in good faith; in other words, the evidence is not to be approached with a wholly uncritical eye.

(3) The court would caution itself against unsubstantiated and unparticularised assertions, especially where particulars and information have been sought by the other side. It is incumbent on the company to put forward “sufficiently precise factual evidence” to substantiate its allegations.

(4) The court does not try the dispute on affidavit but is to determine whether a substantial dispute exists. In so doing, the court necessarily has to take a view

on the evidence, to see if the company is merely “raising a cloud of objections on affidavits” or whether there really is substance in the dispute raised by the company. Even where the company has obtained unconditional leave to defend in an application for summary judgment, the Companies Court is not precluded from examining the evidence and taking a view on whether the debt is disputed on substantial grounds.”

9. These judgments demonstrate that it is necessary for a company contending that it has a bona fide defence on substantial grounds to put before the court not just a series of assertions of fact that if made out at trial would constitute a defence, but credible evidence that demonstrates sound reasons to think that the asserted facts may be proved at trial.”

9. In the present case I am satisfied that the non-payment of the balance of the second payment certificate establishes *prima facie* an unpaid debt. So far as the Company’s position as regard the reasons for non-payment are concerned, these are set out in the defence and counterclaim that has been filed in the High Court Action. There has been no meaningful supplementation of what appears in that pleading. It is convenient, therefore, to quote from the defence and counterclaim to show what the Company’s case is in this regard:

“DEFENCE AND COUNTERCLAIM

....

34. The Defendant denies the matters mentioned in paragraph 14. The Defendant admits that it received the set of keys for Phase 1 Area and signed a Completion of Works & Handover Confirmation but such were done in the light of the Defendant’s wish to commence business as soon as possible to reduce its losses as a result of non-completion of works by the Defendant in respect of Phase 1 Area. In fact on or before 13 February 2014 the Plaintiff, the Defendant and two other parties conducted a joint defect inspection on Phase 1 Area and the parties agreed that there were 88 items of defects or unfinished matters and such were to be cured latest by 28 February 2014, such were recorded in the PM Defects Schedule.

35. In respect of matters mentioned in paragraph 15a. to 15d., the Defendant avers that despite protests, the Plaintiff did not complete the remedial works to the satisfaction of the Defendant.

....

37. In reply to paragraph 23 the Defendant avers that the Plaintiff had failed to complete the works for Phase 1 Area as mentioned in paragraph 34 hereinabove and further the Plaintiff had been asked to complete the Phase II Works since the Phase II Area had been available for works, both verbally and in writing on 14 October 2014 but the Plaintiff has ignored such demands. The Defendant has and will suffer damages as a result of such breach and has in law a lien of any money the Plaintiff has with the Defendant.

....

Counterclaim

1. The Defendant repeats paragraphs 1 to 40 hereinabove mentioned and avers that the Plaintiff's failure to complete Phase I and Phase II Works as above mentioned has caused damages to the Defendant in that the Defendant's business is obstructed or hindered by such failure.

2. The Defendant will give further particulars of damages upon the formal termination of the Agreement, which the Defendant will seek Counsel's opinion prior to doing so.

3. In any event, whether the Defendant terminates this Agreement or not, the Defendant will later quantumize all the damages and apply to court for award of such damages, with amendments to pleadings, if necessary.

AND the Defendant counterclaims:

(1) Damage as pleaded in paragraph 1 of the Counterclaim herein, to be assessed;

(2) Interests on the said damages;

(3) Costs;

(4) Other relieves and orders this Honourable Court deems appropriate."

10. As is apparent from the pleading, no details at all are provided in respect of the alleged claim for damages, indeed no coherent explanation

A is contained in the pleading of why the balance of at least the second
B payment certificate was not paid. I am not satisfied on the basis of what I
C find in the defence and counterclaim that the Company has demonstrated a
D *bona fide* defence on substantial grounds. So far as the question of
E insolvency is concerned the evidence is, as is normally the case, in such
F circumstances sparse. The Company has not filed its accounts or any
G positive evidence which demonstrates solvency. It, of course, is not
H obliged to do so. It did, however, have to take a view on whether the fact
I that the court might find that a substantial sum remained owing to the
J Company, and the general factual circumstances relied upon by the
K Petitioner was sufficiently cogent and persuasive that in the absence of its
L filing evidence to suggest that the conclusions the Petitioner had reached
M were wrong, there was a risk that the court would find that on the balance of
N probabilities the Company is insolvent. By insolvent I mean unable to pay
O its debts as they currently fall due. I am rather less concerned in the present
P case on applying the balance sheet test which, given the evidence, would not
Q be very meaningful.

11. It does seem to me that the Petitioner has demonstrated that it
has a substantial amount owed to it by the Company, which on the face of
the evidence, has no assets in Hong Kong, and no particular reason to pay
the Petitioner in the event that the Petitioner was able to obtain judgment in
the High Court Action against it. It seems to me on the basis of the
evidence as it stands at the moment, that is a fairly compelling inference that
the Company is not able to pay its debt as they fall due in particular it is not
able to pay the debt due to the Petitioner.

12. It is, therefore, appropriate in the circumstances of this case to make the normal winding-up order. I will, however, hear counsel briefly on the question of costs.

(Submissions on costs)

13. The normal winding-up order provides the costs that the costs are paid by the Company effectively out of the assets of the Company.

14. I will make the winding-up order and the costs order nisi that the Petitioner's costs are paid by the Company.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Ernest Ng, instructed by Alvan Liu & Partners, for the petitioner

Mr SUI See Chun, instructed by Dr Siu See Kong, in-house solicitor for the respondent

Attendance of the Official Receiver's Office, for the Official Receiver was excused